BEFORE
THE PUBLIC SERVICE COMMISSION OF
SOUTH CAROLINA
DOCKET NO. 2017-281-E

In Re:

Shorthorn Solar, LLC; Rollins Solar, LLC; Juniper Solar, LLC; Meslam Solar, LLC; Culpepper Solar, LLC; Ashley Solar, LLC; Jefferson Solar, LLC; Madison Solar, LLC; Fairfield Solar, LLC; Bell Solar, LLC; Webster Solar, LLC; B&K Solar Farm, LLC; GEB Solar, LLC; Ross Solar, LLC; Summerton Solar Farm, LLC; Clarendon Solar Farm, LLC; Azalea Solar LLC; Cardinal Solar LLC; Sunflower Solar LLC; Cosmos Solar LLC; Zinnia Solar LLC; Chester PV1, LLC; Ninety-Six PV1, LLC; Newberry PV1, LLC; Bradley PV1, LLC; Jonesville PV1, LLC; Ft. Lawn PV1, LLC; and Mt. Croghan PV1, LLC,

Complainants/Petitioners,

v.

Duke Energy Carolinas, LLC and Duke Energy Progress, LLC,

Defendants/Respondents.

DUKE ENERGY CAROLINAS, LLC'S AND DUKE ENERGY PROGRESS, LLC'S ANSWER TO COMPLAINT

Pursuant to the Notice issued by the Public Service Commission of South Carolina ("Commission") on September 15, 2017, and 26 S.C. Regs. 103-826, and other applicable South Carolina law, Duke Energy Carolinas, LLC ("DEC") and Duke Energy Progress, LLC ("DEP" and, together with DEC, the "Companies"), answering the Complaint of Shorthorn Solar, LLC; Rollins Solar, LLC; Juniper Solar, LLC; Meslam Solar, LLC; Culpepper Solar, LLC; Ashley Solar, LLC; Jefferson Solar, LLC; Madison Solar, LLC; Fairfield Solar, LLC; Bell Solar, LLC;

Webster Solar, LLC; B&K Solar Farm, LLC; GEB Solar, LLC; Ross Solar, LLC; Summerton Solar Farm, LLC; Clarendon Solar Farm, LLC; Azalea Solar LLC; Cardinal Solar LLC; Sunflower Solar LLC; Cosmos Solar LLC; Zinnia Solar LLC; Chester PV1, LLC; Ninety-Six PV1, LLC; Newberry PV1, LLC; Bradley PV1, LLC; Jonesville PV1, LLC; Ft. Lawn PV1, LLC; and Mt. Croghan PV1, LLC ("Complainants"), respond as follows:

INTRODUCTION

DEC and DEP have fully satisfied their obligations under the Public Utility Regulatory Policies Act of 1978 ("PURPA"), Federal Energy Regulatory Commission ("FERC") regulations and precedent, and South Carolina law and precedent, and have acted in good faith, by offering to purchase the output of the Complainants' proposed solar generation projects—in aggregate, more than 1,150 megawatts ("MW") of new solar capacity—at rates calculated based upon the Companies' fixed forecasted avoided capacity and energy costs over five year terms. A five-year term appropriately balances PURPA's goals of encouraging the development of cogeneration and small power production generating facilities, while protecting the Companies' customers from the greater risk of overpayment associated with longer contract terms. Complainants have presented no evidence to the contrary. For the reasons more fully set forth in this Answer, the Companies respectfully request that the Commission find that the power purchase agreements ("PPAs") offered to Complainants are commercially reasonable and consistent with South Carolina's implementation of PURPA, and, further, that Complainants have failed to carry their burden of showing that DEC and DEP have not met their obligations under PURPA and, accordingly, deny the Complaint, and grant such other relief as the Commission deems just and proper.

Congress enacted PURPA in response to the mid-1970s energy crisis, with the dual intentions of lessening the country's dependence on foreign oil and controlling consumer costs. To achieve these goals, PURPA promoted electric utilities' conservation of oil and natural gas, and, under Section 210, encouraged the development of cogeneration and small power production generating facilities. Through PURPA, Congress established a scheme of "cooperative federalism," directing FERC to promulgate regulations to implement PURPA, while ultimately authorizing state regulatory authorities, such as the Commission, and non-regulated utilities to provide state-by-state implementation consistent with FERC's regulations.[1] In 1980, FERC established regulations implementing PURPA through Order No. 69.[2] As explained in Order No. 69, "[e]ach electric utility is required under section 210 [of PURPA] to offer to purchase available electric energy from cogeneration and small power production facilities which obtain qualifying status. . . [and] to pay rates which are just and reasonable to the ratepayers of the utility, in the public interest, and which do not discriminate against cogenerators or small power producers."[3] PURPA provides that rates for such purchases from cogenerators and small power producers ("qualifying facilities" or "QFs") may not exceed "the incremental cost to the electric utility of alternative electric energy," which is "the cost to the electric utility of the electric energy which, but for the purchase from such cogenerator or small

[1] *See* 16 U.S.C. § 824a-3(a), (f)(1) (2012); *FERC v. Mississippi*, 456 U.S. 742, 750-51, 102 S. Ct. 2126, 72 L.Ed.2d 532 (1982); *see also* Memorandum of Agreement between the Federal Energy Regulatory Commission and the Idaho Public Utilities Commission at 2 (Dec. 24, 2013) (available at https://www.ferc.gov/legal/mou/mou-idaho-12-2013.pdf, last visited Oct. 16, 2017) (explaining that PURPA established a program of cooperative federalism where State Commissions are responsible for implementing PURPA and may do so "in a manner that accommodates local conditions and concerns so long as the implementation is consistent with PURPA and the FERC's regulations implementing PURPA.").

[2] *See Final Rule Regarding the Implementation of Section 210 of the Public Utility Regulatory Policies Act of 1978*, Order No. 69, 45 Fed. Reg. 12,214, 12,215 (1980) ("Order No. 69").

[3] Order No. 69 at 12,215; *see also* 16 U.S.C. § 824a-3(b) (2012).

power producer, such utility would generate or purchase from another source."[4] FERC's regulations term this cost the "avoided cost."[5]

Under PURPA's cooperative federalism framework, state commissions are afforded "great latitude" in determining just and reasonable PURPA policies, recognizing that the states are best suited to consider local concerns and to balance PURPA's goals with the "economic and regulatory circumstances [that] vary from State to State and utility to utility."[6] Beginning with South Carolina's initial implementation of PURPA in 1981, the Commission has sought to adequately address PURPA's goals in a manner that is just and reasonable to South Carolina electricity consumers and in the long term public interest of the State. Consistent with FERC's regulations, in Order No. 81-214, the Commission set the framework for utilities and QFs entering into PPAs with rates for purchases to be set at the utilities' avoided costs.[7] That framework provides for standard rates, terms, and conditions specifically approved by the Commission for a subset of smaller QF projects (known herein as Schedule PP or the "standard offer tariff"[8]) and recognizes the right of the utility and QF to negotiate contracts pursuant to PURPA for larger QF projects. Currently, the Companies' Commission-approved standard offer tariffs for small QFs are limited to QFs up to two MW.[9] Because all of Complainants' QF solar generation projects greatly exceed Schedule PP's small QF generator size eligibility limitation

[4] 16 U.S.C. § 824a-3(b), (d).

[5] 18 C.F.R. § 292.304(a)(2) (2017).

[6] Order No. 69 at 12,230-12,231.

[7] *In re: Small Power Production and Cogeneration Facilities – Implementation of Section 210 of the Public Utility Regulatory Policies Act of 1978*, Order No. 81-214 (Mar. 20, 1981) ("Order No. 81-214").

[8] *See* 18 C.F.R. § 292.304(c) (2017) (establishing requirement for standard rates for purchases from small QFs of at least 100 kilowatts in size).

[9] *See Order Approving Revised Schedules PP (SC) Purchased Power and PP Purchased Power, and Terms and Conditions for Each as Proposed Duke Energy Carolinas, LLC and Duke Energy Progress, LLC*, Order No. 2016-349, Docket No. 1995-1192-E (May 12, 2016) (approving standard offer tariffs available to QFs two MW or smaller).

(as represented by the Complainants[10]), Complainants are not eligible for the Companies' standard offer tariffs, but may instead enter into negotiated PPAs with the Companies pursuant to PURPA.

Consistent with this framework, and contrary to Complainants' allegations, the Companies have met their obligations under PURPA by offering in good faith to purchase power from those Complainants that have requested to negotiate PPA contracts[11] at the Companies' current forecast of their respective avoided capacity and energy costs through PPAs for terms of five years. As discussed further herein, a five-year PPA term is (i) consistent with PURPA, as previously implemented by this Commission; (ii) reasonable and appropriate in light of the Companies' paramount obligation to maintain reliable system operations and to mitigate customer risk of long-term overpayments exceeding avoided cost; and (iii) consistent with and generally more favorable than the term of PPAs offered to QFs in neighboring Southeastern states, including North Carolina, Alabama, Mississippi, Tennessee, and Georgia.

Complainants allege that they will show "specific violations" of PURPA and prior Commission Orders implementing PURPA.[12] However, the Complainants fail to introduce any evidence or otherwise provide support for these baseless allegations. The Companies recognize and answer herein that their proposed avoided cost rates and terms of the negotiated PPAs offered to Complainants must be consistent with PURPA. However, as Complainants admit, neither PURPA nor FERC's implementing regulations specify minimum or maximum terms for

[10] The Companies are without sufficient information to determine the nameplate capacity of GEB Solar, LLC. See *infra* paragraph 22.
[11] The Companies have not been able to locate any request by B&K Solar Farm, LLC, GEB Solar, LLC, or Ross Solar, LLC for PURPA PPAs or pricing.
[12] Complaint at page 1.

negotiated PURPA contracts.[13] Further, this Commission has not previously specified a minimum or maximum term for PPAs with QFs that are not eligible for the standard-offer tariff. Instead, the Commission has consistently decided to leave such terms to be negotiated between the parties.[14] Notably, and contrary to Complainants' unsupported allegations, the Commission has previously approved a term of one year for a standard-offer contract.[15] Further, the Commission has specifically denied claims that a five year PPA with an avoided cost rate that resets every two years renders QF projects unfinanceable or violates PURPA.[16]

The Companies have offered Complainants PURPA PPA terms and conditions at fixed forecasted avoided costs that reflect current economic, system operations and regulatory circumstances, and that are just and reasonable to customers and in the public interest. Since the enactment of Act 236,[17] the Companies have experienced surging growth in the amount of utility-scale QF solar generation being proposed within their service areas in the State. As of September 30, 2017, 2,810 MW of proposed solar QFs are in development in the Companies' interconnection queues, compared to 152 MW of proposed solar QF interconnection requests under development as of January 1, 2015 (all of which was located on the DEP system).

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[13] *See* Complaint at page 8; *Windham Solar LLC*, 157 FERC ¶ 61,134 at n. 13 (2016) ("*Windham Solar*").

[14] See Order No. 81-214 at p. 9 (recognizing "the substantial flexibility of negotiation which is reserved to each contracting party under part 292.301(b)"); *In re: Small Power Production and Cogeneration Facilities – Implementation of Section 210 of the Public Utility Regulatory Policies Act of 1978*, Order No. 85-347 at pp. 20-21 (Aug. 2, 1985) ("Order No. 85-347") ("The Commission urges voluntary negotiations of long-term contracts"); *In re: Small Power Production and Cogeneration Facilities – Implementation of Section 210 of the Public Utility Regulatory Policies Act of 1978*, Order No. 85-770 at pp. 4-5 (Sept. 5, 1985) ("Order No. 85-770") (denying petition for reconsideration and rehearing of Order No. 85-347 and explaining that "[t]he questions of unfairness and financial difficulties are a matter of point of view, needs of the individual QF, needs of the utility, and the needs of the ratepayers. Good faith negotiations should resolve these issues."); and *In re: Small Power Production and Cogeneration Facilities – Implementation of Section 210 of the Public Utility Regulatory Policies Act of 1978*, Order No. 89-56 at p. 9 (Feb. 8, 1989) (continuing to decline to mandate long-term rates as part of the standard PURPA contract and encouraging negotiation).

[15] *In re: Proceeding for Approval of PURPA Avoided Cost Rates for Electric Companies,* Order No. 96-570 (Aug. 28, 1996) (adopting stipulation between Duke Power Company and the Consumer Advocate providing for reduction in initial standard offer contract term from five years to one year).

[16] Order No. 85-347 (Aug. 2, 1985) (approving five-year standard offer contract for Carolina Power and Light Company) (petition for reconsideration and rehearing denied in Order No. 85-770).

[17] South Carolina Distributed Energy Resource Program Act, S.C. Code Ann. §§ 58-39-110 *et. seq*.

Specifically as to the Complainants' proposed projects, based on information the Companies have received from the Complainants, if all of the Complainants' projects come online, the amount of solar generating capacity in the Companies' combined South Carolina territory will increase by more than 1,150 MW. Given this unprecedented surge in QF development in South Carolina and the potential for such a large addition of distributed solar QF generation on the Companies' systems, the avoided cost rates and PPAs offered to the Complainants represent DEC and DEP's good faith effort to achieve the goals of PURPA to encourage QF development while meeting DEC's and DEP's obligations to provide reliable electric service and to protect the Companies' customers from long-term overpayment for QF energy and capacity that exceeds DEC's and DEP's incremental cost of alternative energy required to serve customers.

The Companies' avoided cost rates offered to QFs are based on a projection of DEC's and DEP's avoided capacity and energy costs over the course of the contract term, and the rate offered to Complainants is fixed for the duration of the PPA. As a result, as the Companies' actual avoided costs evolve based on market conditions, the rates paid under PPAs entered into pursuant to PURPA become less accurate. When costs to either produce electric power or to purchase power outside of PURPA are in decline, such as the Companies have experienced in recent years with continued decreasing natural gas and electric power costs, customers are exposed to the significant risk that the utility is paying avoided cost rates that greatly exceed the Companies' actual incremental cost of alternative capacity and energy, or their "avoided" costs, contrary to the directives of both PURPA and FERC.[18]

In addition, the Companies are seeing increasingly larger solar QF projects being developed in South Carolina, as exemplified by the Complainants' proposed projects, all of

[18] *See* U.S.C. § 824a-3(b); 18 C.F.R. § 292.304(a)(2).

which are well above two MW and many of which are greater than 10 MW, up to 75 MW. The increase in size and number of QFs, in turn, further increases the "forecast risk" for customers of above-market payments to QFs, which is already inherent in long-term fixed-rate QF contracts. A five-year PPA term therefore appropriately balances PURPA's goals of encouraging QFs, while protecting the Companies' customers from potential overpayments by updating the avoided cost rates paid to QFs more frequently and thus more accurately representing the Companies' true avoided costs. Notably, at the end of the five-year term, the Companies are still obligated under PURPA and current FERC regulations to purchase the QFs' output at the utilities' updated – and inherently more accurate – avoided capacity and energy costs.

The reasonableness of the Companies' PUPRA PPA terms and offerings is also validated by the manner in which numerous other similarly-situated states implement PURPA. Specifically, a number of other traditionally-regulated jurisdictions in the Southeast have approved PPA terms of five years or less for utility-scale QF generators. Alabama recently approved forecasted energy and capacity rates fixed for a one-year term with an evergreen provision allowing the QF to sell power in future years at updated avoided cost rates.[19] Tennessee[20] and Mississippi[21] have minimum one-year terms. North Carolina recently enacted legislation limiting PPAs for QFs not eligible for that state's standard offer tariffs to maximum

[19] *For approval of Rate CPE – Contract for Purchased Energy*. AL PSC re Alabama Power, Order, Docket No. U-5213, 2017 WL 977573 at *4 (March 7, 2017) (recognizing that "reaching [a] balance between projected cost and actual cost has not occurred in many cases," and that when that balance is not achieved, "customers [are left] paying more to QFs than what was intended under PURPA").

[20] Tenn. Valley Auth., Dispersed Power Production Guidelines, (updated September 30, 2017) (*available at* https://www.tva.gov/file_source/TVA/Site%20Content/Energy/Renewables/Dispersed%20Power%20Program/dispersed.pdf).

[21] *In Re: Notice of a Routine Change in the Standard Rate for Purchases by Entergy Mississippi, Inc., of Electric Energy and Qualifying Cogeneration and Small Power Production Facilities with Design Capacity of 100kW or Less*, Order, Docket No. 2016-UN-170 (Dec. 6, 2016) (approving Entergy's minimum contract term of one year as "just and reasonable and consistent with applicable law and rules of [the] Commission"); *see also* Entergy Mississippi, Schedule for Purchases from Qualifying Cogeneration and Small Power Production Facilities, (effective Dec. 30, 2016) (available at http://www.entergy-mississippi.com/content/price/tariffs/emi_qf.pdf).

five-year terms.[22] Georgia's PURPA regime uses a short-term hourly avoided energy rate calculated by the utility, updated monthly, and offers a short-term proxy forecasted avoided capacity rate, updated annually, based upon the utility's integrated resource planning forecasted capacity needs.[23] Other traditionally regulated jurisdictions outside of the Southeast also have approved or allow terms of five years or less, including Washington[24] and Idaho, which have each approved a two-year term.[25] Because the Companies' offered five-year PPA term is generally consistent with – and, in most cases, longer than – other Southeastern states' implementation of PURPA, the Companies have reasonably determined that offering utility-scale solar QFs above two MW fixed forecasted energy and capacity rates through a commercially-reasonable PPA for a term of five years is just and reasonable to our customers, non-discriminatory to QFs in South Carolina, and sufficiently long-term to comply with PURPA, and to allow Complainants "reasonable opportunities to attract capital from potential investors."[26] Complainants have offered no evidence that demonstrates otherwise.

It is against this backdrop of evolving economic, system operations, and regulatory circumstances that the Companies have offered PPA terms and rates to Complainants that

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[22] N.C.G.S. § 62-156(c).
[23] *See generally* Georgia Public Service Commission Docket No. 4822; *see also* *http://www.psc.state.ga.us/electric/GPC_%20QF_Fundamentals_Guide-PPT.pdf,* at Slide 7 (explaining that Georgia Power Company offers a fixed priced QF contract but "[d]ue to ratepayer risk associated with fixed payments based on projections, QF would need to provide benefits to ratepayers commensurate with the size of the added forecast risk, such as availability, dispatchability, reliability, operational forecast information or ensure ratepayer indifference, and offer the proposal into one of the Company's RFPs.").
[24] *WUTC v. PacifiCorp*, Order 05, Docket UE-130043 (Dec. 4, 2013) (approving PacifiCorp's standard contract with a fixed avoided cost applicable only to the first five years of the term).
[25] *Order on Reconsideration, In the Matter of Idaho Power Company's Petition to Modify Terms and Conditions of PURPA Purchase Agreements,* Case No. IPC-E-15-01, Order 33419 (Nov. 5, 2015) (reaffirming initial conclusion that "[b]y adjusting avoided cost rates more frequently, avoided costs become a truer reflection of the actual costs avoided by the utility and allow QFs *and* ratepayers to benefit from normal fluctuations in the market" based in part on the utility's showing that a "contract term [of] two years more accurately reflects true avoided costs and appropriately balances 'the competing interest of protecting utility customers and developing QF generation'") (emphasis added, internal quotations omitted).
[26] *Windham*, 157 FERC ¶ 61,134 at P 8.

include the calculation of DEC's and DEP's forecasted long-term avoided capacity and energy costs fixed over a period of five years. As addressed below in the Companies' specific responses to Complainants' allegations, there has been no "refusal to enter into long-term [PPAs] with the Complainants," as alleged. The Companies have approached PPA negotiations with the Complainants in good faith and believe their offered PPA terms and conditions are entirely consistent with DEC's and DEP's obligations and with Complainants' rights under PURPA, as well as both this Commission's prior guidance and FERC's implementing rules and precedent. As further supported by this Answer, DEC and DEP respectfully request that the Commission find that the Complainants have failed to carry their burden of showing that the Companies' offers of five-year PPA terms to Complainants are not consistent with PURPA, FERC's regulations, and Commission precedent. Accordingly, the Commission should deny the Complainants' request for any relief.

ANSWER

I. FOR A FIRST DEFENSE

1. The Companies deny each and every allegation of the Complaint except as hereinafter admitted.

2. With respect to the allegations of the Complaint stated under the heading "Complainants/Parent Companies," the Companies are without sufficient information to admit or deny the allegations contained in numbered paragraphs 1 and 2.

3. Answering the allegations of numbered paragraph 3, the Companies admit that, with the exception of B&K Solar, LLC, GEB Solar, LLC, and Ross Solar, LLC, the Southern Current Projects have each requested to negotiate PPAs with the Companies pursuant to PURPA. The Companies deny that B&K Solar, LLC, GEB Solar, LLC, and Ross Solar, LLC have

requested to negotiate PPAs with the Companies pursuant to PURPA. The PPAs offered by the Companies to the relevant Southern Current Projects are both sufficiently long-term to meet DEC's and DEP's obligations under PURPA and are commercially reasonable. The Companies deny any implied allegation that in order to be "commercially reasonable," a PPA term must be longer than five years.

4. The Companies are without sufficient information to admit or deny the allegations contained in numbered paragraphs 4 and 5.

5. Answering the allegations of numbered paragraph 6, the Companies admit that the Adger Solar Projects have each requested to negotiate PPAs with the Companies pursuant to PURPA. The PPAs offered by the Companies to the Adger Solar Projects are both sufficiently long-term to meet DEC's and DEP's obligations under PURPA and are commercially reasonable. The Companies deny any implied allegation that in order to be "commercially reasonable," a PPA term must be longer than five years.

6. The Companies are without sufficient information to admit or deny the allegations contained in numbered paragraphs 7 and 8.

7. Answering the allegations of numbered paragraph 9, the Companies admit that the Narenco Projects have each requested to negotiate PPAs with the Companies pursuant to PURPA. The PPAs offered by the Companies to the Narenco Projects are both long-term and commercially reasonable. The Companies deny any implied allegation that in order to be "commercially reasonable," a PPA term must be longer than five years.

8. The Companies are without sufficient information to admit or deny the allegations contained in numbered paragraphs 10 and 11.

9. Answering the allegations of numbered paragraph 12, the Companies admit that the Ecoplexus Projects have each requested to negotiate PPAs with the Companies pursuant to PURPA. The PPAs offered by the Companies to the Ecoplexus Projects are both long-term and commercially reasonable. The Companies deny any implied allegation that in order to be "commercially reasonable," a PPA term must be longer than five years.

10. With respect to the allegations of the Complaint stated under the heading "Defendants," answering the allegations of numbered paragraph 13, DEC would show that it is a South Carolina limited liability company and is a Public Utility subject to the jurisdiction of the Commission.

11. Answering the allegations of numbered paragraph 14, DEP would show that it is a South Carolina limited liability company and is a Public Utility subject to the jurisdiction of the Commission.

12. With respect to the allegations of the Complaint stated under the heading "Complaint," answering the allegations of numbered paragraph 1, upon information and belief the Companies admit that Complainants are each developing solar photovoltaic generating facilities in various locations in South Carolina.

13. The Companies are without sufficient information to admit or deny the allegations of numbered paragraph 2.

14. Answering the allegations of numbered paragraph 3, the Companies admit that Section 210 of PURPA, 16 U.S.C. § 824a-3, and 18 C.F.R. § 292.303(a) (2017), provide QFs a "right to sell" and imposes an obligation on the Companies to purchase the output of QFs. The Companies also admit that Section 292.304(d)(1) of FERC's regulations allows a QF to choose to sell energy "as available," in which case rates for purchases are based on the utility's avoided

costs calculated at the time of delivery, and that Section 292.304(d)(2) allows a QF to choose to sell energy or capacity pursuant to a legally enforceable obligation ("LEO"), with rates for purchases based either on avoided costs calculated at the time of delivery, Section 292.304(d)(2)(i), or at the time the obligation is incurred, Section 292.304(d)(2)(ii). However, these rights under PURPA extend only to the Complainants' projects that are QFs; as stated infra at Paragraph 34, the Companies have not been able to determine that all of the Projects are QFs.

15. Answering the allegations of numbered paragraph 4, the Companies admit that FERC is directed under Section 210 of PURPA, 16 U.S.C. § 824a-3(a), to establish regulations to implement the purchase and sale obligations contained therein, and that PURPA also requires state regulatory authorities to implement PURPA in a manner consistent with FERC's regulations, 16 U.S.C. § 824a-3(f)(1).

16. Answering the allegations of numbered paragraph 5, FERC's precedent speaks for itself. The Companies deny any implied allegation that the five-year PPA term offered to the Complainants is in any way inconsistent with this precedent. The Companies admit that FERC recognized in *JD Wind 1, LLC* that, for QFs that choose for their rates to be calculated at the time the obligation is incurred under Section 292.304(d)(2)(ii) of FERC's regulations implementing PURPA, the avoided costs at the time of delivery may differ from those costs calculated at the time the obligation is incurred,[27] but deny that DEC and DEP are prohibited under current law from mitigating the increasingly significant overpayment risks associated with fixed payments based upon forecasts or projections by offering a QF a fixed price PPA with a five-year term.

17. The Companies answer the allegations of numbered paragraph 6, as follows:

[27] *See* 130 FERC ¶ 61,127, at 61,131 (2010).

a. The Companies admit that, in Order No. 69, in discussing the availability of electric utility system cost data under Section 292.302 of its regulations, FERC said that "in order to be able to evaluate the financial feasibility of a cogeneration or small power production facility, an investor needs to be able to estimate, with reasonable certainty, the expected return on a potential investment before construction of a facility."[28] In discussing the LEO rules in Order No. 69, FERC also "agree[d] with … [m]any commenters [who] have stressed the need for certainty with regard to return on investment in new technologies."[29]

b. The Companies admit that in *Windham Solar* FERC stated that it has "explicitly agreed with previous commenters that 'stressed the need for certainty with regard to return on investment in new technologies'" and that FERC stated that "a legally enforceable obligation should be long enough to allow QFs reasonable opportunities to attract capital from potential investors."[30]

c. The Companies deny any implied allegation that these statements require any particular term for a PURPA contract, or that they do anything other than simply acknowledge that potential investors in QF projects need to be able to estimate a return on "new technologies" before they can decide whether to invest in a particular project.

d. The Companies are without sufficient information to admit or deny the allegation that a long-term PPA at fixed rates is the only practical way to provide certainty of a revenue stream to a QF that chooses to locate in the service territory of a vertically integrated, fully regulated electric utility. The Companies note that the Commission has previously held that "[a] fixed, standard rate is just one of the many factors to be considered by lenders

[28] 45 Fed. Reg. 12,214, at 12,219.
[29] 45 Fed. Reg. at 12,224.
[30] 157 FERC ¶ 61,134 at P 8.

contemplating financing for QF projects."[31] The Commission went on to explain in that order that "[a] project which has marginal economic feasibility will not attract financing simply as a result of a fixed standard rate."[32] Moreover, the Companies deny any implied allegation that PURPA or FERC's implementing regulations obligate the Commission or the Companies to guarantee financing for any particular QF, or to guarantee any particular type of financing for QFs in South Carolina, either through use of a specific length of PPA term or otherwise.

e. The Companies deny any implied allegation that they have not offered Complainants PPAs that are long-term and commercially reasonable.

f. The Companies deny any implied allegation that a QF that chooses to locate in South Carolina cannot access wholesale or organized markets for its facility's output.

18. The Companies are without sufficient information to admit or deny the allegation of numbered paragraph 7.

19. The Companies do not have sufficient information to admit or deny, and Complainants have not pleaded with sufficient specificity to allow for admission or denial of, the general allegation that, "in general, the longer the duration of a solar project's fixed-price PPA, the easier it is for a developer to obtain financing. Conversely, the shorter the duration, the more difficult it is to obtain financing." The Companies also deny any implied allegation that PURPA or FERC's implementing regulations obligate the Commission or the Companies to guarantee financing for any particular QF, or to guarantee any particular type of financing for QFs in South Carolina, either through use of a specific length of PPA term or otherwise.

20. The Companies provide the following in answer to the allegations of numbered paragraph 9.

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[31] Order No. 85-770 at p. 4.
[32] *Id*.

a. The Companies admit that FERC has not specified minimum or maximum terms that must be offered to all QFs. Indeed, FERC has recently *expressly clarified* that it has not made such a specification, at *Windham Solar* fn. 13 ("our regulations do not, however, specify a particular number of years for such legally enforceable obligations."). FERC's "established policy is to leave to state regulatory authorities … issues relating to the specific application of PURPA requirements to the circumstances of individual QFs."[33]

b. As stated above, the Companies admit that FERC declared in *Windham Solar* that "a legally enforceable obligation should be long enough to allow QFs reasonable opportunities to attract capital from potential investors." However, FERC's opinion in *Windham Solar* does not address whether a particular negotiated PURPA contract term is long enough to allow "reasonable opportunities to attract capital." To the contrary, as mentioned above, FERC expressly clarified in *Windham Solar* that it has not specified a particular length that is required for such contracts. The question in *Windham Solar* was instead whether a utility's approved avoided cost tariff was consistent with PURPA where such tariff only offered only "real time pricing" under 18 C.F.R. 292.304(d)(1), instead of options for both "real time pricing" and fixed pricing at the utility's forecasted avoided cost rate (as required under 18 C.F.R. 292.304(d)(2)).

c. The Companies deny the allegation that "[i]n other words, under PURPA a QF is entitled to a PPA of sufficient length to be reasonably financeable." FERC has never drawn this conclusion that all QFs must be "reasonably financeable." FERC's statements in *Windham Solar* and, as discussed above, in Order No. 69, all support the notion that PURPA contract terms should be such that QFs have a "reasonable opportunity" to attract capital for their

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[33] *See Cuero Hydroelectric Inc.*, 85 FERC ¶ 61,124, at 61,467 (1998) (internal citations omitted); *see also Policy Statement Regarding the Commission's Enforcement Role Under Section 210 of the Public Utility Regulatory Policies Act of 1978*, 23 FERC ¶ 61,304, at 61,646 (1983) ("The Commission's regulations allow the States … a wide degree of latitude in establishing an implementation plan.").

projects; none of these provisions requires that QFs be able to attract a certain type of investment, or that a contract term be "reasonably financeable." The Companies therefore deny any implied allegation that the Commission or the Companies are obligated under PURPA to ensure the QF's ability to secure any particular type or source of financing for any particular terms of financing.

21. Answering the allegations of numbered paragraph 10, upon information and belief, the Companies admit that in this Commission's May 12, 2016 Order No. 2016-349 issued in Docket No. 1995-1192-E, the Commission approved the Companies' Schedule PP and standard offer QF PPAs available to QFs sized two MW or less, which have a maximum term of 10 years. In that Order, the Commission also stated that "[a]ll rates for QFs above two MW, or otherwise ineligible for the standard tariffs, shall be negotiated under [PURPA] and the [FERC's] implementing regulations."[34] The Companies deny any implied allegation that the Commission's approval of the Companies' standard offer maximum contract term of 10 years for small QFs less than two MW requires the Companies to also offer a term longer than five years to non-standard QFs from two MW up to 80 MW in size.

22. Upon information and belief, the Companies admit the allegations of numbered paragraph 11, with the exception of GEB Solar, LLC. The Companies do not have sufficient information to admit or deny the nameplate capacity of GEB Solar, LLC.

23. Answering the allegations of numbered paragraph 12, the Companies admit that with the exception of B&K Solar, LLC; GEB Solar, LLC; and Ross Solar, LLC; each of the other Complainants has requested a long-term PPA. The Companies deny that B&K Solar, LLC;

[34] The Complainants cited to Order No. 2016-871 in Docket No. 2016-227-E as reference to DEP's standard contract; however DEP's standard-offer contract was approved in Order No. 2016-349, as cited above. The citation offered by the Complainants is to DEP's 2016 base rate case, which has no relevance to the issues pled in this Complaint.

GEB Solar, LLC; or Ross Solar, LLC has requested a long-term PPA. The Companies deny any implied allegation that the five-year term contained in the PPAs offered to Complainants is either not long-term or not commercially reasonable.

24. Answering the allegations of numbered paragraph 13, the Companies deny that, in response to Complainants' requests for PPAs and rates for the Projects, the Companies have "refused to offer long-term PPAs." The Companies admit that the PPAs offered to Complainants have terms of five years, but deny that five-year terms are not "long term" within the meaning of *Windham Solar* and other relevant FERC precedent. The Companies admit that, for purposes of all non-standard PPAs entered into pursuant to their PURPA purchase obligation, the Companies have and plan to continue to offer solar QFs located in their South Carolina service areas fixed avoided energy and capacity rates and commercially reasonable PPAs with maximum durations of five years, for the reasons discussed herein.

25. Answering the allegations of numbered paragraph 14, the Companies admit that five years is the maximum PPA term they are willing to offer, going forward, to solar QFs located in their South Carolina service areas who are ineligible for the Companies' Schedule PP standard-offer tariffs. The Companies admit that they have previously entered into PPAs with a limited number of solar QFs in South Carolina, when economic and regulatory conditions were different from today, with terms that are longer than five years. The Companies deny, however, any implied allegation that this fact precludes them from offering a five-year term to these 28 Complainants and other large QFs on a non-discriminatory basis, or that the Companies are not entitled to adjust the contract terms that they offer QFs between one negotiation and the next, for those QFs that are ineligible for the Companies' Schedule PP standard offer tariffs. The Companies deny that "historical" PPA offerings must dictate future PPA terms and conditions,

and further deny that the Companies' offers are "[c]ontrary to [the Companies'] longstanding practice," or that evolution in negotiated PPA terms has any relevance to the question of whether a five-year term is consistent with PURPA and the FERC's implementing rules and precedent.

26. Answering the allegations of numbered paragraph 15, the Companies deny that their offers are not made in good faith. The Companies are without sufficient information to admit or deny the remaining allegations contained in numbered paragraph 15. The Companies have propounded discovery upon Complainants seeking additional information related to Complainants' communications with potential investors and lenders for the Projects.

27. In response to the allegations contained in numbered paragraphs 16 through 19, the Companies admit that DEC's and DEP's affiliate, Duke Energy Renewables ("DE Renewables"), independently engages in the non-regulated business of developing owning and maintaining renewable energy generating assets in the United States, including solar and wind generating facilities. The Companies further admit that Duke Energy's website[35] publically highlights certain commercial information about DE Renewables' projects, and, further, that the Duke Energy website speaks for itself. With regard to Complainants' allegations in paragraphs 17-19 presenting publicly available information about the term of renewable energy PPAs entered into between DE Renewables and utility/electric membership corporation ("EMC") purchasers in Texas, California, Arizona, Florida, or North Carolina, the Companies suggest this information speaks for itself. Due to federal and state codes of conduct functionally separating the businesses of the Companies and DE Renewables, however, DEC and DEP also do not have access to non-publicly available information with regard to the commercial terms of PPAs entered into between DE Renewables and other utility/EMC-counterparties. Upon information

[35] *See* https://www.duke-energy.com/our-company/about-us/businesses/renewable-energy/solar-energy (last visited Oct. 16, 2017).

and belief, the Companies do not believe DE Renewables' solar development business strategy relies on the "must purchase" obligation established under PURPA; accordingly, the Companies deny that any of this information is relevant to DEC's and DEP's obligations to comply with PURPA in South Carolina. The Companies further deny that Complainants have accurately and completely characterized the information presented on the DE Renewables "Solar Energy" webpage. Except as specifically admitted herein, the Companies denies the allegations in paragraphs 16 through 19 of the Complaint.

28. The Companies deny the allegations contained in numbered paragraph 20. In the interest of transparency, the Companies note that in the future, DEC and DEP plan to offer 20-year PPAs associated with a North Carolina state-mandated competitive procurement of renewable energy program ("CPRE Program"), including solar generating capacity, pursuant to recently enacted North Carolina General Statutes Section 62-110.8; South Carolina solar providers will be eligible to bid into that procurement. However, contracts entered into under this new CPRE Program will also be procured through a request for proposal ("RFP") to ensure optimal cost-effectiveness and will expressly provide DEC and DEP "rights to dispatch, operate, and control the solicited renewable energy facilities in the same manner as the utility's own generating resources," which traditionally negotiated PURPA contracts may not.[36] Notably, and most relevant to this matter, North Carolina has recently mandated by law that DEC's and DEP's traditional negotiated PURPA PPA offering is now limited to a five year PPA terms – identical to the term offered to the Complainants.[37]

29. The Companies deny the allegations contained in numbered paragraph 21.

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[36] *See* N.C. Gen. Stat. 62-110.8(b). CPRE Program PPAs procured through RFPs administered by DEC and DEP are also anticipated to be entered into pursuant to PURPA.
[37] N.C. Gen. Stat. 62-156(c).

30. The Companies deny the allegations contained in numbered paragraph 22.

31. With respect to the allegations of the Complaint stated under the heading "Violation of Previous Commission Orders," specifically in answer to the allegations contained in numbered paragraph 23, the Commission's orders speak for themselves. However, the Companies specifically admit that in the Commission's Order No. 85-347 issued August 2, 1985, in Docket No. 80-251-E, the Commission's directive on page 26 of that Order, cited by Complainants, that the utilities "negotiate in good faith" was made in the context of negotiations pertaining to requests by QFs that utilities wheel QF power: "The Commission hereby encourages the affected electrical utilities to work with qualifying facilities on a case-by-case basis as requests for wheeling arise. Where an agreement cannot be reached, the qualifying facilities are encouraged to present the issue for resolution to this Commission by way of a complaint proceeding. SCE&G, CP&L and Duke are hereby directed to negotiate with the qualifying facilities in good faith on this issue." Regardless, the Companies have, and will continue to, negotiate in good faith with Complainants and deny any expressly stated or implied allegation that the Companies have not negotiated in good faith with the Complainants for PPAs for these projects.

32. Answering the allegations of numbered paragraph 24, the Commission's orders speak for themselves.

33. Answering the allegations of numbered paragraph 25, the Companies deny that they have not acted in good faith in their negotiations with the Complainants.

34. With respect to the allegations of the Complaint stated under the heading "Violation of PURPA," answering the allegations of numbered paragraph 26, the Companies are without sufficient information to admit or deny the allegation that all of the Projects are self-

certified QFs. The Companies admit that they are currently required under Section 210 of PURPA and 18 C.F.R. § 292.303(a) to purchase the output of QFs. The Companies deny that a fixed avoided cost rate five-year PPA term is not "long-term."

35. Answering the allegations of numbered paragraph 27, as stated above the Companies admit that FERC stated in *Windham Solar* that "a legally enforceable obligation should be long enough to allow QFs reasonable opportunities to attract capital from potential investors," 157 FERC ¶ 61,134 at P 8, and that "[FERC's] regulations do not, however, specify a particular number of years for such legally enforceable obligations," *id.* at fn. 13.

36. The Companies do not have sufficient information to admit or deny the allegation of numbered paragraph 28.

37. The Companies deny the allegation of numbered paragraph 29.

38. Answering the allegation of numbered paragraph 30, the Companies admit that PURPA requires state regulatory authorities to implement PURPA in a manner consistent with FERC's rules.[38] It is the Companies' position that the fixed forecasted avoided energy and capacity rates and five-year terms contained in the PPAs offered by DEC and DEP to Complainants are consistent with FERC's regulations and are nondiscriminatory to QFs, consistent with the public interest, and just and reasonable to their customers, as required by PURPA.

WHEREFORE, Duke Energy Carolinas, LLC and Duke Energy Progress, LLC, having fully set forth their Answer, request that the Commission find that Complainants have failed to carry their burden of showing that the Companies have failed to meet their obligations under

[38] 16 U.S.C. § 824a-3(f)(1).

PURPA and, accordingly, to deny the Complaint, and grant such other relief as the Commission deems just and proper.

Dated this 16th day of October, 2017.

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